IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-823

RAYMOND BELCHER,

Petitioner,

—v.—

CASEY D. STENGEL, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION OF THE AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF OHIO FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE*

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES

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The American Civil Liberties Union and The American Civil Liberties Union of Ohio respectfully move, pursuant to Rule 42 of this Court's rules, to file the within brief amici curiae. Counsel for the respondents has consented to the filing of this brief; counsel for the petitioner has refused consent.

The American Civil Liberties Union and its affiliate, the American Civil Liberties Union of Ohio, request leave to file this brief as amici curiae. Both organizations are organized for the primary purpose of protecting the civil rights and liberties of Americans. The American Civil Liberties Union has been in existence since 1920, and its affiliate, the American Civil Liberties Union of Ohio has been in existence since 1953. One of the constant concerns of both organizations has been the need to provide adequate legal mechanisms to protect against, and remedy, violations of constitutionally protected rights. They have been particularly concerned that recent decisions of the Court have hampered the historic role of the United States District Courts in implementing remedies for violations of constitutional rights. See, e.g., Imbler v. Pachtman, ___ U.S. ___ (1976); Rizzo v. Goode, ___ U.S. ___ (1976); Paul v. Davis, ___ U.S. ___ (1976); Hicks v. Miranda, 422 U.S. 332 (1975). One of our concerns is that this case, in which the lower courts followed settled law in concluding that a police officer, off-duty but acting because of, and under protection of, his office, unjustifiably shot three persons, not become a vehicle for the overruling or narrowing of Monroe v. Pape, 365 U.S. 167 (1961).

Respectfully submitted,

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AS AMICI CURIAE

Interest of Amici Curiae

The interest of amici appears from the foregoing motion.

Introduction

This case raises no novel questions of law. Both Judge Weick, writing for the Court of Appeals, and Judge Kinneary, the trial judge, dealt with the issue of whether the Petitioner, Officer Belcher, acted under color of state law, according to settled precedents, breaking no new ground. Analytically, the "color of state law" issue at this stage of the litigation involves two questions - the sufficiency of the evidence to support the verdict and the propriety of Judge Kinneary's charge to the jury. We will try to demonstrate below that respondent is correct in arguing that the District Court and Court of Appeals committed no error on these points.

We perceive no way for the petitioner to win this case on the basis of settled law and are concerned that the Court might decide to radically change the presently settled understanding of the phrase, "under color of state law." It is one of the primary reasons of this brief to set forth the reasons why the Court should not do so.

With respondents, we do not see the

issue in this case as whether the fact that Officer Belcher shot with a gun he was required by Police Department regulations to have with him makes otherwise private conduct state action.

Moreover, we cannot agree with petitioner that the decisions below "stultify proper law enforcement" or "dampen vigorous law enforcement" (petitioner's brief at p. 23). Petitioner does not and cannot argue here that the jury acted improperly when it rejected his story that he acted in self defense and, instead, concluded that he used excessive force when he shot his gun, killing Noe and Ruff and injuring Stengel. Ultimately, the sole issue here is whether respondents have a remedy for petitioner's misconduct under federal law or simply under state law.

Proceedings Below

Judge Kinneary handled the question of whether Officer Belcher acted under color of state law when he shot Respondent Stengel and Decedents Noe and Ruff in the most cautious possible manner. The complaint alleged that Belcher was "acting under color of the statutes, ordinances, regulations, customs and usages of the State of Ohio, County of Franklin and the City of Columbus." Complaint ¶6, App. p. 9. Belcher moved to dismiss, claiming that "since he

was not technically on duty when the assault occurred he could not have been acting under color of state law." App. p. 31. The order denying the motion pointed out that the facts were not yet in issue, and the allegations were adequate. Ibid.

At trial, the posture of defense counsel, who was also City Attorney, was that Belcher had acted under color of state law. This was clear from a colloquy which took place when he argued for a directed verdict after plaintiffs' case in chief.

"The Court: . . . .

> Is there any question in this case, under this record so far, that Officer Raymond Belcher was acting under color of law?

Mr. Hughes:

> Your Honor, it is my position that he was acting in line of duty under color of law as a policeman of the City of Columbus." App. p. 199.

Indeed, one of the arguments urged by defense counsel, in arguing for a directed verdict on the ground of insufficient evidence of excessive force was that "the force was used pursuant to the actions of a police officer who was a witness to a crime going on in his presence and was acting as a police officer." App. p. 199.

Nevertheless, Judge Kinneary charged the jury that, in addition to proving a deprivation of a federal constitutional right, plaintiffs had the burden of proving that Belcher "acted under color of some state or local law." App. p. 208. He carefully defined the term, "color of law", for the jury, pointing out that, while it encompassed acts within and without lawful authority, the unlawful acts "must be done while the official is purporting or pretending to act in the performance of his official duties." App. p. 209.

Moreover, while Judge Kinneary instructed the jury that "the manner in which Defendant Belcher may have acted under color of state law was that he carried a gun [which police department regulations required him to carry]," he neither told the jury that that fact required them to find "color of law" nor that it was the only evidence on which they could base such a conclusion. The jury charge was neither objectionable nor objected to. Cf. Rule 51, Fed. R. Civ. P.

The Evidence

As suggested above, defense counsel for Officer Belcher, in addition to accepting the jury charge on the color of law issue, likewise failed to contest the sufficiency of the evidence on that point. App. p. 199.

In fact, there was ample evidence on which the jury could place its verdict.

As respondents' brief will point out in greater detail, there was ample evidence for the jury to find that Belcher intervened in the dispute going on in the bar, grabbing one of the participants without announcing himself as a police officer, and that he started shooting his gun when he could not have believed it necessary for self-defense, going so far as to pursue and shoot one of the victims outside the bar.

On the color of law issue, the jury could have relied on the following evidence to find that Belcher was motivated to act by his conception that his official position required him to act, a view corroborated by his superiors' conception of the obligations of Belcher's job.

1. Belcher's own testimony as to his motivation for involving himself in the dispute. At trial, he testified that, after watching the altercation, "...I made up my mind that I was absolutely one way or the other going to arrest all three men - correction, at least two of these men." Tr. p. 648. Thereafter, according to Belcher's testimony, he took out his police-issue tear gas cannister, tr. p. 650, and started for the door to call the police. tr. p. 649.

2. Belcher's own conduct subsequent to the event in which he characterized his action as occurring in the line of duty. This includes the filing of a Workmen's Compensation Claim (which was allowed) for aggravation of a back injury during the incident. App. p. 224, et seq. Belcher filed the claim under an Ohio Statute limiting workmen's compensation to injuries occurring "in the course of employment." Ohio Rev. Code §4123.54.

3. Belcher's belief that he acted because of his official position was corroborated by his superiors' conception of his job requirements. The chief of police testified that all Columbus police officers were "expected to take action in any type of police or criminal activity 24 hours a day...[and] would be subject to discipline if they didn't take action." App. p. 76. That view was corroborated by the Chief's immediate superior, the Safety Director, who, after reviewing the conclusions of the police department, likewise concluded that the conduct had occurred "in the line of duty." App. p. 247.

4. The objective fact of Belcher's possession and use of a gun required to be carried by police department regulations is most significant in connection with the above-quoted reason for the regulation. It exists because Columbus police officers are required, on or off duty, to take action as police

when they see "police or criminal activity." App. p. 76.

5. At trial (and here) Belcher was represented by the Columbus City Attorney, who was empowered by Section 67 of the Columbus City Charter to be the "attorney and counsel...for all officers...[of the city] in matters relating to their official duties." The jury was aware of that fact and, in addition, listened to the arguments the City Attorney made as defense counsel. Throughout the trial, he referred to petitioner as Officer Belcher. In closing argument, he argued that, although Belcher had not identified himself as a police officer, Noe, Ruff and Stengel knew he was one and knew that, because of it, "Police Officer Belcher had to do something." Tr. p. 740. The heart of defense counsel's closing argument was,

> "...it is immaterial to this case as to whether [Belcher] made a right decision; whether or not in his duty as a police officer to restore peace, whether he should have stood up and said I am a policeman,
>
> ... He was a policeman. He had an obligation to do something. He couldn't just sit there while a man was being stomped by two young gentlemen next to him. He had that obligation and he discharged that obligation***" Tr. 742.

Petitioner argues that "the more logical inference to be drawn" from his failure to identify himself was that he did "not intend to act as a police officer." Petitioner's brief, p. 19. From the jury's point of view, however, given the evidence just summarized and the calculated defense trial strategy to clothe Belcher's conduct with the sanction of his office, the jury had little choice but to find that he was "purporting or pretending to act in the performance of his official duties." App. p. 209.

The Meaning of "Under Color of State Law"

As the Court of Appeals pointed out, the jury could easily have found that Belcher abused the authority of his official position. It is the primary purpose of this brief to demonstrate that abuse of authority is and should be conduct under color of state law within the meaning of 42 U.S.C. §1983. Petitioner's brief articulates no other standard, but, since the Court does not ordinarily grant the writ of certiorari to review the sufficiency of evidence, we believe a further analysis is proper.

As the Court is aware, although what is presently §1983 came into being as Section One of the Act of April 20, 1871,

17 Stat. 13., there were no interpretations pertinent to the issue presently being considered in this Court until the 1930's. 1/

The first significant interpretation was in Hague v. C.I.O., 307 U.S. 496 (1939). We believe it set the Court on the correct course of holding that what is now 42 U.S.C. §1983 2/ protects persons against deprivations of rights, privileges and immunities secured by the United States Constitution and laws both by official conduct sanctioned by state law and that which is in violation of state law.

Hague v. C.I.O. was an action in equity under §1983 seeking to enjoin municipal officials from violating constitutional rights. Some of the conduct complained of was claimed to be justified by municipal

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1/ The Civil Rights Cases, 109 U.S. 3 (1883) have no bearing on the present case. There, the Court merely held "state action" to be required under the 14th Amendment, without giving content to the concept as articulated in the Statute under consideration here.

2/ The earlier form was R.S. 1979, but for consistency we will refer to the Section before the Court by its present codification.

ordinances held by the Court to be unconstitutional, and other aspects, such as unlawful searches of persons and seizures of printed material, 307 U.S. at 502, were not. Five members of the Court concurred in the conclusion that the conduct charged was in violation of the constitution and voted to affirm the decree as modified. No distinction was made about the extent to which conduct of officials was authorized by or in violation of local law or whether the local ordinances complied with state law, and only in the lone dissent of Mr. Justice McReynolds was there a suggestion that notions of federalism had any applicability to the plaintiffs' right to relief.

Hague was followed quickly by United States v. Classic, 313 U.S. 299 (1941), which involved a criminal charge under what is now 18 U.S.C. §242, the criminal analogue of §1983,3/ that Louisiana election offi-

3/ This section will be referred to by its modern codification. 18 U.S.C. §242 was then codified as §20 of the Criminal Code, 18 U.S.C. §52, R.S. §5510. It derives from §2 of the Civil Rights Act of 1866, 14 Stat. 27, was reenacted and amended by §17 of the Act of May 31, 1870, 16 Stat. 144, and amended again in the course of the 1874 codification to assume its present form. Although §242 differs from §1983 in the presence of the word "willfully," its interest protected-

(continued next page)

cials had tampered with ballots in a Congressional primary election.

Without dissent on that point 4/ the Court found adequate state action despite the fact that the conduct charged violated state, as well as federal, law. Mr. Justice

(continued)
"rights, privileges and immunities secured by the Constitution and laws of the United States" - is, in this respect, identical to that of §1983, and its state action phrase - "under color of any law, statute, ordinance, regulation, or custom" - is almost identical. There has never been any serious claim that the concept the 1871 Congress had of "state action" in adopting §1983 differed from the ones its predecessors had in adopting 18 U.S.C. §242. As a result, interpretations of "state action" under one have been treated as controlling on the other. See Monroe v. Pape, 365 U.S. 167, 185 (majority opinion), 212 (dissenting opinion)(1961).

4/ Mr. Justice Douglas wrote a dissenting opinion, concurred in by Mr. Justice Black and Mr. Justice Murphy, urging simply that the Court's interpretation of the act to reach primary elections violated the anti-vagueness values implicit in the rule of strict construction of penal laws.

Stone wrote:

> "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." 313 U.S. 326.

The view that misuse of authority was within the term, "under color of law" was challenged for the first time in Screws v. United States, 325 U.S. 91 (1945), but sustained by a vote of six members of the court. 5/ Justices Roberts, Jackson and Frankfurter, dissenting, argued that §242 reached only conduct authorized by state law, and, therefore, that it should not apply to a sheriff and deputy who beat a prisoner to death, because that conduct violated state law as well.

5/ There was no majority opinion. The plurality opinion, written by Mr. Justice Douglas, covered his analysis of the "color of law" and vagueness issues in the case. Although Justices Rutledge and Murphy disagreed with his analysis of the latter issue, their opinions make it clear that they agreed with his analysis of the "color of law" issue.

The rejection of the Frankfurter interpretation continued in Williams v. United States, 341 U.S. 97 (1951), another prosecution under 18 U.S.C. §242, in which the conduct - beating a confession out of a suspect - was an unauthorized violation of state, as well as federal, law. Williams is significant in another respect: the Court found adequate evidence that the defendant, a private detective, acted under color of state law, in the fact that he held a special police officer's card issued by the City of Miami, Florida which granted him policemen's powers. The significant fact was that Williams was not a private interloper but was asserting the authority granted to him by law. 341 U.S. at 100. On the basis of Belcher's testimony and trial defense, his situation is strikingly like that of Williams.

Monroe v. Pape, 365 U.S. 167 (1961) brought about this Court's application to §1983 of the foregoing principles over the lone dissent of Mr. Justice Frankfurter. The Court's opinion extensively surveyed the legislative history of §1983 and concluded that it supported the Classic "misuse of authority" interpretation of the term, "under color of state law."

Independent examination of the legislative history of the Ku Klux Klan Act of April 20, 1871 supports that conclusion. The President's message which led to the

legislation articulated the primary problem as the taking of life and other acts of violence in the southern states. Cong. Globe, 42nd Cong., 1st Sess.244 (1871). That condition of affairs was documented in the Senate Judiciary Committee's report, and extensively discussed in the Congress. See, e.g. Cong. Globe, 42nd Cong., 1st Sess, 152-156 (Remarks of Senator Sherman). The perceived problem was not only the activities of the Klan but the complicity of state officials, such as sheriffs, in its conduct. See, e.g., Cong. Globe, 42nd Cong., 1st Sess. app. 78, 80 (remarks of Rep. Perry), 365 (remarks of Rep. Arthur), 609 (remarks of Rep. Pool), 702 (remarks of Rep. Edmunds). Moreover, the Congress perceived not only that the Klan was protected by local law enforcement authorities but that they participated in its activities. See, e.g., Cong. Globe, 42nd Cong., 1st Sess. app. 309-310, 315 (remarks of Rep. Burchard), 442 (remarks of Rep. Butler), 79 (remarks of Rep. Perry).

This history demonstrates that the 1871 Congressional majority sought to reach both private conspiratorial activity (which it covered in section 2 of the Act of April 20, 1871) and misconduct by public officials, covered by Section One of the Act.

Mr. Justice Harlan, joined by Mr. Justice Stewart concurring in the majority's adoption of the misuse of authority standard

indicated that he was less persuaded by the majority's reading of the legislative history than he was by the illogic of the position urged in Mr. Justice Frankfurter's dissent, 365 U.S. at 194, et seq. 6/ He pointed out that it was hardly likely that the 1871 Congress, with its perception of the problem, would have sought to provide a federal remedy and forum against private conspiratorial conduct and against misconduct authorized by state law but not against the unauthorized misconduct of state and local officials. 365 U.S. at 199.

That view, combined with the policy of stare decisis and absence of a distinction between Classic and Screws was the basis for the concurrence. 365 U.S. at 192.

Since Monroe, the misuse of authority standard has been treated as settled law. In Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970), for example, the Court unanim-

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6/ Even under the Frankfurter view that §1983 reaches only misconduct authorized by state law it is not at all clear that this case, with its extensive post hoc ratification of Belcher's conduct by the Columbus Municipal Government, would fall on the wrong side of the line. See, e.g., 365 U.S. at 258-259.

ously agreed with Mr. Justice Harlan's statement that §1983 reaches a police officer's conduct "whether or not the actions of the police were officially authorized, or lawful." 398 U.S. at 152.

Mr. Justice Harlan's opinion in Monroe suggests that principles of stare decisis are particularly important in cases of statutory interpretation where there is an indication of Congressional acceptance of earlier interpretations. 365 U.S. at 192. That principle is particularly applicable to the "misuse of authority" interpretation of §1983 in Monroe and its predecessors. The Monroe decision was, of course, well known. See, e.g., "Justice," 5 United States Commission on Civil Rights (Nov. 1961). In the years immediately following the decision, Congress considered extensive civil rights legislation, passing several civil rights acts, and made no effort to change the settled interpretation of §1983. During that period, this Court and the lower courts decided numerous cases applying §1983 to cases of misconduct of government officials, including the use of excessive force by persons in law enforcement roles. See, e.g., Scheuer v. Rhodes, 416 U.S. 232 (1974); Palmer v. Hall, 517 F.2d 705 (5th Cir. 1975); Johnson v. Glick, 481 F.2d 1028 (2d Cir. 1973); Howell v. Cataldi, 464 F.2d 272 (3d Cir. 1972); Jenkins v. Averett, 424 F.2d 1228 (4th Cir. 1970); Stringer v. Dilger, 313 F.2d 536 (10th Cir. 1963). The development and meaning of the law was well known to Congress.

Conclusion

This case was properly decided by the lower Courts according to settled principles of law. Rather than changing those settled principles, this Court should adhere to them in the recognition that the implementation of the decision made by the 1871 Congress to provide a federal remedy and a federal forum to protect rights under the federal constitution and laws has been a healthy component of our federalism.

Respectfully submitted,

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